IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

LIBERTY MUTUAL FIRE INSURANCE
COMPANY and HANKINS LUMBER COMPANY — PLAINTIFFS/ COUNTER DEFENDANTS

vs. — Civil Action No. 1:96cv261-D-D

CANAL INSURANCE COMPANY — DEFENDANT/ COUNTER PLAINTIFF

MEMORANDUM OPINION

Presently before the court are the cross-motions of the parties for the entry of summary judgment. The resolution of the plaintiffs' claim requires the interpretation of a contract of insurance issued by the defendant Canal Insurance Company ("Canal"). More particularly, the dispute in this matter centers around a "truckman's endorsement" contained in that policy and the endorsement's effect upon coverage under the facts at bar. Finding that Canal's "truckman's endorsement" does not preclude coverage in this case from extending to Hankins, the court shall grant the plaintiffs' motion for summary judgment and both award it declaratory relief and dismiss the defendant's counterclaim.

Additionally, the resolution of the defendant's counter-claim requires this court to examine the contract of insurance issued by plaintiff Liberty Mutual Insurance Company ("Liberty Mutual") to the plaintiff Hankins to determine whether coverage under that policy extends to non-parties to this action, Messrs. John Wayne Morgan and Bennie L. Perkins. Finding that Liberty Mutual's policy of insurance does not cover these individuals, the court shall deny the defendant's motion for summary judgment.

. Factual Background

The plaintiff Hankins Lumber Company[1] engages in the production and harvesting of lumber and other wood products in the state of Mississippi. As part of its regular business operations, Mr. A. Burton Hankins made an oral contract on behalf of Hankins Lumber for the hauling of wood and wood products with John Wayne Morgan, d/b/a Morgan Trucking Company ("Morgan"). Exhibit "4" to Defendant's Motion, deposition of A. Burton Hankins, p.32 ("[Hankins Lumber] contract[ed] with [Morgan] to do the chip hauling, shaving hauling that lumber from Sturgis to Winona . . . and that one inch lumber."); Exhibit "5" to Defendant's Motion, Deposition of Wayne Morgan, p. 8 ("I ran the chips and stuff for [Hankins] . . . I haul product from point A to point B."); p. 32 ("I hauled all [Hankins'] green lumber and by-products away from the mill."). From Mr. Hankins perspective, the arrangement was a simple one:

> Q: Other than the price, the actual price that Mr. Morgan was going to get paid, was there any discussion about what was required under the deal? What was required under the arrangement?
>
> A: Just carry it. He would load it and carry it to Winona.

Hankins dep. p. 40. Mr. Morgan's understanding was likewise unclouded. Morgan dep. p. 58 ("The only contract I had [with Hankins Lumber] is, 'You haul the chips, I will pay you."). Looking to the course of dealing between the two parties regarding this oral contract, the court finds additional aspects of the agreement which are relevant to this case:

) Hankins paid Morgan a specific amount of money per ton for the hauling of shavings or chips, and would pay Morgan a specific amount of money per haul for the hauling of lumber. Hankins dep. p.34, 39. The amount paid was negotiated by both Hankins and Morgan. Hankins dep. pp. 57; Morgan dep. pp. 36-38.

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[1] Hankins Lumber Company is a closely held corporation apparently owned in its entirety by the family of A. Burton Hankins. Exhibit "1" to Plaintiff's Motion, Deposition of A. Burton Hankins, p. 8-9.

Hankins paid Morgan weekly. Morgan dep. p. 39.

) Hankins dictated from where and to where the loads were hauled. He did not, however, have the right to designate to Morgan the route to be taken to the ultimate destination. Morgan dep. p. 56. The load in question in this case was a load of lumber between Hankins Lumber facilities in Sturgis, Mississippi and Winona, Mississippi. Hankins dep. p. 64.

) Hankins did not have the right under the agreement to have his own employees drive Morgan's trucks. Morgan dep. p. 55.

) Hankins never paid any rental fee for the trucks themselves. Morgan dep. p. 56.

> Q: Okay. . . . [T]here was no hiring of your vehicles, your trucks or trailers and when I say hiring I'm talking about like renting or leasing them?
>
> A: No.

Morgan dep. p. 58.

) Hankins did not dictate a particular time table for the hauls of lumber products, but required Morgan to pick up loads "when the mill was running." Hankins dep. p. 43; pp. 48-49 ("Q: Could he haul whenever he wanted to? A: Those shavings and chips, they unload 24 hours a day.") As a practical matter, Morgan hauled the products on a regular basis. Hankins dep. at 45 ("[Morgan] would just haul it every day or every other day or whenever it was there.").

) All of the products hauled belonged to Hankins Lumber. Hankins dep. p.50

) Hankins Lumber required Morgan to have his own insurance. Hankins dep. p. 53 ("[H]e was supposed to have insurance to cover himself."). Morgan did carry insurance on his trucks, and even carried workmen's compensation insurance for the drivers that worked for him. Morgan dep. pp. 16-17, 19.

) Morgan always used his own trucks and trailers to make the hauls. Hankins dep. p. 58; Morgan dep. p. 8. Morgan paid for all maintenance and repairs for his trucks and trailers, paid for his own insurance, and paid his employees and all of their employment taxes. Morgan dep. p. 48.

) Hankins Lumber did not make any employment related deductions from the payments made to Morgan. Hankins dep. p. 59; Morgan dep. p. 43 ("Q: Did it deduct any amount for your employees or any amount for taxes or anything else?

A: No.").

) Hankins Lumber was the primary source of hauling business for Morgan, but Morgan did do other hauling work without informing Hankins Lumber or obtaining their consent. Morgan dep. p. 50.

Morgan Trucking employed several truck drivers, including Bennie L. Perkins, in the operation of its trucking business. Perkins, while driving a truck owned by Morgan and hauling a load of lumber products pursuant to the Hankins/Morgan agreement, was involved in an automobile accident with a vehicle driven by Ricky Vaughn. As a result of this accident, Ricky Vaughn was killed. Vaughn's widow filed a wrongful death action against Perkins, Morgan and Hankins in the Circuit Court of Oktibbeha County, Mississippi. Liberty Mutual has undertaken a defense of Hankins in that action, and Canal has undertaken a defense of both Morgan and Perkins. This action was filed following coverage disputes as a result of the accident.

. Discussion

. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show to the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); see Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir.1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir.1996). Once such a showing is presented by the moving party,

the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir.1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir.1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510; see Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir.1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248, 106 S.Ct. at 2510; see City of Nederland, 101 F.3d at 1099; Gibson v. Rich, 44 F.3d 274, 277 (5th Cir.1995). Further, "[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Anderson, 477 U.S. at 248, 106 S.Ct. at 2510; see City of Nederland, 101 F.3d at 1099. Finally, all ferefrom. See Anderson, 477 U.S. at 254, 106 S.Ct. at 2513; Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir.1995); Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir.1994); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir.1994). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir.1996); Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir.1996). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F.3d at 1075 (emphasis omitted); see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990).

. Interpretation of an Insurance Contract

The court initially notes that instead of this matter being of a more routine nature, involving only the insurance company and its insured, the controversy at bar revolves over which insurance carrier must pay first, *i.e.*, whether the coverage arising under the Canal policy is primary.

> Restauranteurs are familiar with the good-natured struggles which often ensue when guests attempt to pick up the tab for their dinner companions. It may be fanciful to assume that it was to avoid similar unseemly displays when the time came to pay a casualty loss that insurance companies incorporated "other insurance clauses" in their policies. Certainly, there is one dramatic difference between those generous diners, would-be hosts, and the insurers--the diner pleads for the opportunity to pay the bill; the insurer's use of the "other insurance" clause is designed to confer that honor on the other company.

ALLEMAN, RESOLVING THE "OTHER INSURANCE" DILEMMA: ORDERING DISPUTES AMONG PRIMARY AND EXCESS POLICIES, 1981 KAN. L. REV. 75. The court finds the same distinction is appropriate here, as Canal Insurance and Liberty Mutual sit at the table and stare at each other over the check.

As already noted by the court, the determination central to the resolution of this cause is the applicability of an endorsement contained in Canal's contract of insurance with Morgan. The familiar rule of contract interpretation under Mississippi law is that a clear and unambiguous contract will be enforced as written. Century 21 Deep South Properties, Ltd. v. Keys, 652 So.2d 707, 717 (Miss.1995). Furthermore, "[i]n contract construction cases our focus is upon the objective fact - - the language of the contract. We are concerned with what the contracting parties have said to each other, not some secret thought of one not communicated to the other." Heritage Cablevision v. New Albany Elec. Power System of New Albany, 646 So.2d 1305, 1313

(Miss.1994) (quoting Osborne v. Bullins, 549 So.2d 1337, 1339 (Miss.1989)).

However, "[t]he familiar public policy" in Mississippi is that "courts must interpret the terms of an insurance policy (and the statutes from which they derive) liberally in favor of providing coverage for the insured." Gulf Guar. Life Ins. Co. v. Duett, 671 So.2d 1305, 1308 (Miss. 1996) (citing Aetna Cas. and Sur. Co. v. Williams, 623 So.2d 1005, 1008 (Miss.1993)). Therefore

> [a]n ambiguous term in an insurance policy must be construed against the drafter of the policy and in favor of the insured. Nationwide Mutual Ins. Co. v. Garriga, 636 So.2d 658, 662 (Miss.1994). An ambiguity in an insurance policy exists when the policy can be interpreted to have two or more reasonable meanings. See Insurance Co. of North America v. Deposit Guaranty Nat. Bank, 258 So.2d 798, 800 (Miss.1972). Further, where a policy is subject to two interpretations equally reasonable, that which gives the greater indemnity to the insured should be adopted. State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So.2d 1371, 1372 (Miss.1981); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So.2d 805, 811 (Miss.1970).

Duett, 671 So.2d at 1308. In construing the Canal policy and its attendant endorsements, then, this court will construe all ambiguities against the defendant Canal.

> So, to benefit from an exclusionary provision in an insurance contract, the insurer must show that the exclusion applies and that it is not subject to any other reasonable interpretation that would afford coverage.

Canal Ins. Co. v. T.L. James & Co., Inc., 911 F. Supp. 225, 228 (S.D. Miss. 1995) (citing Nationwide Ins. Co. v. Garriga, 636 So. 2d 658 (Miss. 1994)).

. The "Truckman's Endorsement"

The basis for Canal's denial of primary[2] coverage in this case is its reliance upon a "truckman's endorsement" contained in the policy of insurance issued to Morgan. That

[2] As noted by the plaintiffs, Canal does not appear to dispute that Hankins is otherwise covered as an insured under its policy of insurance issued to Morgan, and makes no effort in its submissions to this court to state otherwise. Exhibit "1" to Motion of Liberty Mutual for Summary Judgment, Canal Insurance Policy, § A, III(d).

provision provides in relevant part:

> In consideration of the premium charged for the policy to which this endorsement is attached, it is understood and agreed that no coverage is extended to any person, firm or organization using the described automobile pursuant to any lease, contract of hire, bailment, rental agreement or any similar contract or agreement, either written or oral, express or implied, the terms and provision of the Insuring Agreement III of Section A, entitled "Persons Insured" notwithstanding.
>
> In the event the automobile described in this policy is being used or maintained pursuant to any lease, contract of hire, bailment, rental agreement or any similar contract or agreement, either written or oral, express or implied, the insurance afforded the named insured shall be excess insurance over any other insurance.

Exhibit "7" to Plaintiffs' Motion, Canal Policy of Insurance. Under Canal's reading of the policy and of the facts at bar, the oral contract between Hankins Lumber and Morgan was a "contract of hire" or similar agreement which triggers the applicability of the truckman's endorsement. As such, Canal contends, coverage does not extend to Bennie Perkins in this case nor is it primarily liable under other provisions of the policy. The plaintiffs' reading of the policy and facts in this case is, conversely, that the Hankins Lumber/Morgan agreement does not fall within the provisions of the endorsement and therefore it does not provide a justification for the denial of primary coverage in this case. As Canal notes in its submissions to the court, "[t]he critical issue before the court is the interpretation and construction of the oral contract between Hankins and Morgan in the context of the respective insurance policies." Defendant's Response Brief, p. 3.

. The Canal Insurance Contract

The court will first take up the meaning of the Canal policy before seeking to apply the facts at bar to determine what coverage exists. As already stated, if the terms of a policy of insurance are ambiguous and subject to multiple interpretations, this court must construe the terms of the policy against the drafter of the policy. The parties, not surprisingly, take divergent

views on the meaning of the phrase "contract of hire." When looking to the terms of the policy, the court finds that both of the parties' interpretations are reasonable ones, and therefore the "truckman's endorsement" is indeed ambiguous with regard to the facts of this case.

Black's Law Dictionary provides two definitions for the word "hire. They are, in pertinent part:

> **Hire**, *v.* To purchase the temporary use of a thing, or to arrange for the labor or services of another for a stipulated compensation.
>
> . . .
>
> **Hire**, *n.* Compensation for the use of a thing, or for labor or services . . . . Act of hiring. A bailment in which compensation for the use of a thing, or for labor and services about it.

Blacks Law Dictionary 729 (6th ed. 1990). It is plain from these definitions of "hire" that a contract of hire might be for *either* the use of a thing *or* for the labor or services of an individual. The question is whether the phrase *as used in the endorsement* is so broad. One reading, that of the defendant, is that it indeed means any sort of contract for hire. When looking to the context of the endorsement and in light of the policy as a whole, another more narrow reading of the term comes to light. In this vein, it is reasonable to read the provision as being satisfied only when "pursuant to any lease, contract of hire, bailment, rental agreement or any similar contract or agreement" *of the insured automobile*. This would distinguish between the two types of contracts of hire - i.e., those for the use of a chattel and those for the personal services or labor of an individual. Employing the reading espoused by Canal in this case, a plethora of normally covered activities, if not the entire trucking operation of Morgan, would be without primary coverage under the policy. As Morgan is in the trucking business and on every load is engaged in a contract of hire for his service of transporting goods, Canal's broad interpretation of the

policy exclusion would leave him without the benefit of primary coverage under the Canal policy in every instance he contracted the use of his hauling services. He would, then, be paying his premiums to Canal for the benefit of excess coverage only, a result this court doubts was intended by Morgan.

Canal's construction of the endorsement is a strained one, and appears to be the least reasonable of the two. This fact does not necessarily dictate a finding against the defendant in this regard, however. The interpretational presumption for ambiguities that this court must apply, rather, mandates such a result. As the provision is subject to more than one interpretation, it is ambiguous. This court must, therefore, enforce the interpretation which is most favorable to the non-drafter - the plaintiffs in this case.

. The Case at Bar

When looking to the undisputed facts surrounding this case, it is apparent that the contract between Hankins and Morgan was one for services, namely the service of hauling lumber and lumber products. There is no indication that the truck itself was hired, leased, or similarly made the subject of a bailment-like arrangement. Hankins never exercised control over the truck in question regarding its maintenance or daily operation - he did not even have the right to have his own employees drive the truck or work on it. More importantly, there is no provision of the agreement that requires Morgan to use the particular truck in question. The simplicity of the agreement in the minds of the contracting parties is illustrative - "Just carry it" from here to there. From the facts before the court, it does not appear that Hankins was concerned in any way exactly how the transfer took place. Indeed, Morgan could apparently have used any type of conveyance to transport the goods or any truck that he had a legal right to use. While not

dispositive on the issue, the court also finds important the manner of payment involved. Hankins paid Morgan either as a function of the amount of material hauled, or as a function of the number of hauls made. Hankins did not pay Morgan as a function of the amount of time the truck was used in the benefit of Hankins, *e.g.*, per day, week or month, as would be expected in a lease-type agreement. While the court has considered and finds relevant many other facts which are before the court, it is clear from those facts already discussed that the contract between Hankins and Morgan is not a "contract of hire" under the truckman's endorsement contained in the Canal policy. See Canal Ins., 911 F. Supp. at 229 (finding identical exclusion not applicable to contract for hauling of sand and gravel). As such, Canal may not rely upon that provision to deny primary coverage under that policy.

. Coverage under the Liberty Mutual Policy

Canal seeks in its counterclaim to have this court determine that both Perkins and Morgan are covered under the policy of insurance issued to Hankins by the plaintiff Liberty Mutual. To this end, Canal asserts that Liberty Mutual is obligated to defend and indemnify Perkins and Morgan in the state court action. Central to Canal's argument in this regard is that the truck driven by Perkins and owned by Morgan fits the definition of a "covered" vehicle pursuant to the terms of the Liberty Mutual policy which provides liability coverage for "any auto." As Perkins was using a "covered" auto at the time of the accident, Canal continues, both Perkins and Morgan are covered under the Liberty Mutual policy. Exhibit "2" to Canal's Motion for Summary Judgment, Liberty Mutual Policy of Insurance, § II(A)(1)(b)-(c), Bait-stamped pp. 191-92 . The policy's definition of "any auto" in the Liberty Mutual policy includes:

9= NONOWNED **AUTOS** ONLY. Only those **autos** you do not own, lease, hire, rent or

> borrow that are used in connection with your business. This includes autos owned by your employees or partners or members of their households but only while used in your business or your personal affairs.

Exhibit "2" to Canal's Motion for Summary Judgment, Liberty Mutual Policy of Insurance, Bait-stamped p. 190 (emphasis in original). Canal contends that if the Morgan truck involved in the subject accident was not one leased, hired, rented or borrowed pursuant to the Hankins/Morgan agreement, then it is covered pursuant to the Liberty Mutual policy under this definition and coverage should be extended to Morgan and Perkins as the Morgan truck was "used in connection" with the business of Hankins Lumber by hauling its products.

The application of the phrase "used in connection with your business" as asseverated by Canal is a broad one, and would encompass an innumerable array of circumstances. This court cannot say that Hankins "used" Morgan's truck in connection with his business as anticipated by this policy provision. The only real control exerted by Hankins over Morgan's truck was to dictate the point of pick-up and the destination for the shipped goods. Judge Lee, in Canal Ins. Co. v. James, noted of such a construction of the term "using":

> The court . . . is persuaded that the term "using" . . . , while not necessarily limited to actual physical operation of the vehicle (i.e., driving), is appropriately read as requiring more than just the ability to direct and control the vehicle.

Canal, 911 F. Supp. at 229-30. This court agrees with Judge Lee. It is unreasonable[3] to attach Canal's broad interpretation to this provision of the Liberty Mutual policy, and such an interpretation would lead to quite absurd results. The word "used" connotes a requisite degree of control or direction noticeably absent from the facts at bar. Morgan and Perkins are not entitled

[3] The court notes that as Liberty Mutual is the drafter of this policy, this court is required to construe all ambiguities in its provisions against Liberty Mutual in the interpretation of this policy's terms. See, supra, p. 6. As the court has determined that Canal's proffered interpretation of the word "use" in the policy is an unreasonable one, however, the court need not employ this principle of insurance contract interpretation.

to liability coverage under the Liberty Mutual policy. There is no genuine issue of material fact to this matter, and Liberty Mutual is entitled to the entry of a judgment as a matter of law on this claim. As such, the court shall grant the plaintiffs' motion for summary judgment as to this matter. Conversely, Canal is not entitled to the entry of a judgment as a matter of law on this claim, and the court shall deny its motion in that regard.

. Conclusion

After careful consideration of the motions of the parties, the court is of the opinion that Canal's motion for summary judgment should be denied and the plaintiffs' motion for summary judgment should be granted. There exist no genuine issues of material fact in this matter, and the plaintiffs are entitled to the entry of a judgment as a matter of law. The defendant, however, is not entitled to the entry of a judgment as a matter of law. As such, the motion of the plaintiffs shall be granted, and the motion of the defendant shall be denied.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of November 1997.

United States District Judge

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FOR THE NORTHERN DISTRICT OF MISSISSIPPI
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LIBERTY MUTUAL FIRE INSURANCE
COMPANY and HANKINS LUMBER COMPANY — PLAINTIFFS/ COUNTER-DEFENDANTS

vs. — Civil Action No. 1:96cv261-D-D

CANAL INSURANCE COMPANY — DEFENDANT/ COUNTER-PLAINTIFF

ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

) the motion of the defendant Canal Insurance Company for the entry of summary judgment on its behalf in this cause is hereby DENIED;

) the motion of the plaintiffs Liberty Mutual Fire Insurance Company and Hankins Lumber Company for the entry of summary judgment on their behalf is hereby GRANTED to the extent detailed in this court's opinion and order;

) the defendant's counterclaim for declaratory relief is hereby DISMISSED;

) the defendant Canal Insurance has a duty to defend and indemnify the plaintiff Hankins Lumber Company in the above referenced state court action, pursuant to the terms of the policy of insurance issued by Canal to its insured John Wayne Morgan, d/b/a Morgan Trucking Company. The coverage provided under this policy is not excess coverage and provides primary coverage pursuant to the policy terms.

) judgment is hereby entered on behalf of the plaintiffs with regard to their claim of breach of contract;

) this matter shall proceed to trial on the remaining issues before the court.

SO ORDERED, this the _____ day of November 1997.

United States District Judge